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Supreme Court of the United States

OCTOBER TERM, 1962

No. 632

MICHAEL CLEARY, PETITIONER

vs.

EDWARD BOLGER

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

APPENDIX TO APPELLANT'S BRIEF—Filed May 10, 1961

**IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

EDWARD BOLGER, PLAINTIFF-APPELLEE

v.

MICHAEL CLEARY, DEFENDANT-APPELLANT

and

**UNITED STATES OF AMERICA, ROBERT G. ANDERSON,² Secretary
of the Treasury of the United States of America,
Customs Agents WILLIAM J. O'SHEA and THOMAS F.
LOUGHMAN, Customs Enforcement Officers WALTER J.
CONLON and JOSEPH E. PATTERSON and DOROTHY T.
ZECHA, Shorthand Reporter, in charge of office of
Supervising Agent of Customs, Port, of New York,
DEFENDANTS**

STATEMENT UNDER RULE 15(b) (omitted in printing)

[fol. 2]

**IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

AMENDED COMPLAINT

Plaintiff, by his attorney, Joseph Aronstein, for his complaint herein respectfully shows to this Court and alleges:

1. That plaintiff is a citizen of the United States of America and a resident in the Town of Keansburg, State of New Jersey.

2. Upon information and belief, that defendant, Robert G. Anderson, is the Secretary of the Treasury of the

United States of America, in charge of the Treasury Department and the Customs Service of the United States together with its agents, servants and employees are under his jurisdiction, all being agents and employees of the United States of America.

[fol. 3] 3. That on or about the 12th day of September, 1959, plaintiff while duly and legally riding in his automobile in the City, County and State of New York, was halted by Customs Enforcement Officers Walter J. Conlon and Joseph E. Patterson, both employed in the Customs Service of the United States of America.

4. That thereupon the said defendants, Walter J. Conlon and Joseph E. Patterson unlawfully and illegally took plaintiff into custody and arrested him and proceeded to make an illegal search of the automobile plaintiff had been riding as aforesaid.

5. That after the foregoing illegal seizure and search said defendants, Walter J. Conlon and Joseph E. Patterson seized plaintiff's automobile and ordered him to re-enter same together with said defendant Joseph E. Patterson and to drive to an office of the United States Customs Service at 22 Stone Street, in this Southern District of the United States.

6. That plaintiff requested of said defendants, Walter J. Conlon and Joseph E. Patterson leave to telephone or otherwise communicate with his family or friends in order to procure the services of a lawyer, but such request was denied and refused and plaintiff was not permitted to make a telephone call.

7. That thereafter plaintiff having been placed in custody and arrested at about 9:15 o'clock in the forenoon of that day, was kept in custody in the aforesaid service office and another office and advised and threatened by Customs Agents and Enforcement Officers that unless he signed a document giving the said customs agents the right to go to his home and search same and take him there, they would arrest not only plaintiff, but his wife and any other occupants in his home found therein.

[fol. 4] 8. That despite plaintiff's several requests for an opportunity to use the telephone to secure a lawyer, said requests were denied and plaintiff was importuned to

sign the document hereinabove referred to and upon his refusal so to do said defendants William J. O'Shea and Thomas F. Loughman made further threats as aforesaid, placing plaintiff in fear that said threats would be executed.

9. That thereafter, under duress and fear of the aforesaid threats, plaintiff signed the paper or document as demanded by said defendants William J. O'Shea and Thomas F. Loughman and requested a copy thereof, but said William J. O'Shea and Thomas F. Loughman refused to give plaintiff a copy of said document or paper.

10. That thereafter and after plaintiff signed the aforementioned paper he was forcibly taken by the defendants customs agents to his home in Keansburg, New Jersey, kept in custody, under guard and control of one of the said agents and thereupon they illegally proceeded to search his home and garage and seize property therefrom.

11. That thereupon after the aforementioned illegal search and seizure, plaintiff requested from the defendants customs agents a list of the property seized by them and removed from plaintiff's home and for a receipt therefor, but said request was denied and plaintiff continued to be kept in custody by defendants customs agents.

12. That by continuing threats against plaintiff by defendants customs agents while plaintiff was in their custody and under arrest plaintiff was thereupon compelled under further threats and ordered to sign a paper not written in the English language, but apparently having shorthand symbols thereon, although plaintiff requested and demanded to know what he was signing.

[fol: 5] 13. That thereupon one of said defendant customs agent threatened plaintiff that he would be held in high bail by the United States Commissioner if he refused to sign the aforementioned paper with shorthand symbols thereon and plaintiff thereupon did sign said paper without knowing or understanding the contents thereof.

14. That thereupon on or about 8 o'clock in the evening of the said day, plaintiff was released from the custody of the aforesaid defendants customs agents without having been arraigned before a United States Commissioner or District Judge and informed not to move from his home,

but to keep himself available for said defendants customs agents at all times.

15. That thereafter on or about October 13, 1959, plaintiff was arrested by the Police Department of New York City and the Waterfront Commission of the State of New York, on a charge of Grand Larceny and thereafter arraigned before a New York City Magistrate on October 14, 1959, for a hearing on the Grand Larceny charge.

16. That the object which is the subject matter of the abovesaid charge of Grand Larceny is a tape recorder illegally seized by said defendant customs agents as aforementioned during the aforementioned illegal search of plaintiff's home on or about September 12, 1959.

17. Upon information and belief that said defendants customs agents or one of them propose to turn over or has turned over to the Police Department of the City of New York and the Waterfront Commission aforesaid the subject matter of the Grand Larceny charge for which plaintiff herein is being prosecuted by the State of New York as aforementioned and in addition thereto proposes to testify in the said criminal prosecution against plaintiff [fol. 6] in a proceeding pending before the Waterfront Commission of New York Harbor, and the Courts of New York with regard to information procured by the defendants under and pursuant to and as a result of the illegal search and seizure aforementioned.

WHEREFORE, plaintiff prays for judgment as follows:

1. That the aforesaid defendants all and each of them be restrained from testifying against plaintiff as to any matter heretofore complained of herein and as to any matter learned by them, as a result of the aforementioned illegal search and seizure and arrest.

2. That the defendants herein be directed to return to plaintiff the papers signed by him as hereinabove set forth and any copies thereof.

3. That defendants herein be directed to return to plaintiff any and all property seized or taken into their custody from plaintiff's home and automobile resulting from the illegal search and seizure as aforesaid.

4. That the defendants or any or all of them, their agents, servants and employees be restrained and enjoined from testifying against plaintiff herein with respect to any information received or procured by them in the course or as a result of the aforementioned search and seizure and that any such information and property procured by them or delivered by them to any person or authority be delivered to plaintiff herein.

5. And for such other and further relief as to the Court seems just and proper in the premises.

Dated, New York, N. Y.

JOSEPH ARONSTEIN,
Attorney for Plaintiff,
1650 Broadway,
New York, 19, N. Y.

[fol. 7]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANSWER

The defendant, Michael Cleary, for his answer to the complaint herein:

FIRST DEFENSE

Denies material allegations as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 11.

2. Denies each and every allegation contained in paragraphs 12, 13 and 14 of the complaint, except admits that plaintiff left the headquarters of United States Customs at 201 Varick Street, New York, New York, at or about 7:00 P. M. and that defendant was not arraigned before a United States Commissioner or District Judge.

3. Admits the allegations contained in paragraphs 16 and 17, of the complaint, except denies knowledge or information sufficient to form a belief as to the truth of

the allegations that plaintiff's home was illegally searched and that a tape recorder was illegally seized.

SECOND DEFENSE

4. The Court does not have jurisdiction of the subject matter of the action, and the matter in controversy does not exceed the sum of ten thousand dollars.

[fol. 8]

THIRD DEFENSE

5. The Court does not have equitable jurisdiction to issue an injunction in the instant action.

FOURTH DEFENSE

6. The Court does not have jurisdiction to issue an injunction enjoining the production of evidence or testimony in any pending state criminal proceeding by virtue of the provisions of Section 2283 of Title 28 of the United States Code.

FIFTH DEFENSE

7. The complaint fails to state a claim upon which relief may be granted.

WHEREFORE, defendant, Michael Cleary, demands judgment dismissing the complaint, together with the costs and disbursements hereof.

WILLIAM P. SIRIGNANO,
General Counsel for the Waterfront
Commission of New York Harbor
and Attorney for Defendant, Michael
Cleary,
Office and P. O. Address,
15 Park Row,
New York 38, New York.

[fol. 9]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil 153-182

EDWARD BOLGER, PLAINTIFF

against

UNITED STATES OF AMERICA, ROBERT G. ANDERSON, Secretary of the Treasury of the United States of America, Customs Agents WILLIAM J. O'SHEA and THOMAS F. LOUGHMAN, Customs Enforcement Officers WALTER J. CONLON and JOSEPH E. PATTERSON and DOROTHY T. ZECHA, Shorthand Reporter, in charge of office of Supervising Agent of Customs, Port, of New York, and MICHAEL CLEARY,

DEFENDANTS

Civil 60-1184

EDWARD BOLGER, PLAINTIFF

against

WATERFRONT COMMISSION OF NEW YORK HARBOR and DAVID C. THOMPSON, Commissioner, and JAMES O'MALLEY, JR., Commissioner,

DEFENDANTS

Appearances:

JOSEPH ARONSTEIN, Esq., New York City, Attorney for Plaintiff.

[fol. 10]

S. HAZARD GILLESPIE, JR., Esq., United States Attorney for the Southern District of New York, Attorney for Defendants, United States of America, Robert G. Anderson, William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph E. Patterson and Dorothy T. Zecha. ARTHUR V. SAVAGE, Esq., Assistant United States Attorney of Counsel.

WILLIAM P. SIRIGNANO, Esq., General Counsel and Attorney for Waterfront Commission of New York Harbor, New York City. IRVING J. MALGHMAN, Esq., of Counsel.

OPINION

BRYAN, District Judge: . .

Edward Bolger, the plaintiff in these two actions, is a hiring agent and longshoreman licensed by the Waterfront Commission of New York Harbor and employed on the New York waterfront.

Bolger claims that on September 12, 1959 he was arrested in the early morning by federal customs agents without a warrant and held until the evening of that day without being arraigned or even charged; that during the day his home was searched and property found there seized without warrant, and incriminating statements were extracted from him while he was under detention. He contends that the arrest, search and seizure and detention were all unlawful and in violation of his rights under the Fourth and Fifth Amendments of the Constitution and under Rules 4, 5(a) and 41 of the Federal Rules of Criminal Procedure.

In the first action, Civil No. 153-182, the defendants O'Shea and Loughman are Customs agents, and Conlon and Patterson are Customs enforcement officers who were concerned in the detention and questioning of Bolger and [fol. 11] the search and seizure. Defendant Zecha is a Customs Service shorthand reporter who took down and transcribed an incriminating statement made by Bolger during his detention. Defendant Cleary is a Waterfront Commission detective who was present when Bolger's statement was taken and at other times during his detention.

Bolger had originally named as defendants in the first action the United States and the Secretary of the Treasury. The action has been dismissed as to these defendants.

Bolger seeks an injunction restraining each of the remaining defendants from testifying, as to any evidence obtained or statements made during his detention or

secured by the search and seizure, in criminal proceedings against him now pending in the Court of Special Sessions of the City of New York, or in proceedings before the Waterfront Commission for the revocation of his longshoreman's and hiring agent's licenses. He also seeks the return of all property seized.

In the second action, Civil 60-1184, the defendants are the members of the Waterfront Commission of New York Harbor, a bi-state agency of the States of New York and New Jersey. Bolger seeks to restrain the Commission and its members from considering any evidence obtained in the course of the detention and search in the proceedings before it relating to his licenses.

Bolger brought on a motion before me for a preliminary injunction in his first action. I directed that a hearing be held before me on the facts. After that hearing had started Bolger commenced his second action against the Waterfront Commission. During the course of the hearing all parties stipulated that the hearing should be considered a final trial on the merits in both actions. The trial has been concluded and both actions are now ripe for final decision.

[fol. 12]

I. THE FACTS

The facts as developed at the trial and as I find them to be are as follows:

In September 1959 Bolger was employed by the Cosmopolitan Line as an assistant boss of stevedores mainly acting as foreman during the loading and unloading of ships at various piers along the New York shore of the North River. He had been employed on the waterfront for 35 years. He is 54 years old, married, and lives in Keansburg, New Jersey, about an hour's drive from New York. He has had no previous trouble with the law.

September 12, 1959 was a Saturday. At about 8:00 in the morning, Bolger entered Pier 56, North River, at 14th Street, one of the piers on which he regularly worked. The pier was not being worked on that day.

Federal customs enforcement officers, Patterson and Conlon, were in a parked car about 200 yards distant. They were on the lookout for thefts from the piers and

particularly thefts of liquor which had been occurring frequently. They observed Bolger enter the deserted pier, carry a cardboard carton from it and place the carton in a car parked at the pier entrance. He then was observed to move pallets about the pier with a fork lift truck. About half an hour after he had entered the pier he got in his car and drove south. The customs officers followed in their car.

At Pier 46, North River, four blocks south, Patterson displayed his badge and ordered Bolger to pull over to the side and stop. Bolger complied and the officers parked their car in front of his. The officers ordered him out of his car and "frisked" him. It was then shortly after 8:30 a. m.

Conlon asked Bolger to show him the carton which he had carried from the pier. Bolger did so: It contained only empty soda bottles. Conlon examined several other cartons in the back of the car. They contained more empty soda bottles. He then ordered Bolger to open the [fol. 13] trunk. Again there were only empty soda bottles. Bolger was questioned about whether he had obtained any liquor from the piers. He replied that he had six or eight bottles at home which he had bought from crew members who had bought the liquor from ship's stores. When Conlon had completed the search of the back of the car and the trunk, Patterson searched the front of the car. In the glove compartment, he found a number of spark plugs and windshield wipers. Two of the windshield wipers and six of the spark plugs were stamped "Made in England". They could have been bought here for about seven dollars.

In view of Bolger's statements about the possession of liquor obtained from crew members and the two windshield wipers and six spark plugs found in his car stamped "Made in England", the Customs officers decided to take Bolger in custody. By then it was close to 9 o'clock.

Bolger and Patterson got into Bolger's car and followed Conlon's car south. Both parked in front of Pier 42. Conlon went inside to call his superiors, Customs agents O'Shea and Loughman. Patterson took Bolger's car keys, told Bolger to remain in the car, and followed Conlon inside. When he came out a few minutes later Bolger

asked to telephone. Patterson refused but said he would be permitted to call later.

Patterson and Bolger then followed Conlon in Bolger's car to 54 Stone Street, headquarters of the Customs Enforcement Section, arriving there about half past nine. Bolger again asked Patterson to use the telephone and was again refused.

At 10 a.m. customs agents Loughman and O'Shea arrived at 54 Stone Street. At about 10:30, after some preliminary questions Bolger was taken into a separate room by O'Shea. He admitted that he had some thirty or forty bottles of liquor obtained from seamen, and additional merchandise, at his home in Keansburg. Later in [fol. 14] the interrogation Bolger signed a so-called consent to search which read as follows:

"I, Edward Joseph Bolger, hereby authorize W. J. O'Shea and Customs Agents of the Customs Agency Service, U. S. Treasury Department, to conduct a complete search of my residence located at 80 Wills Ave. Keansburg, N. J. These agents are authorized by me to take from my residence any letters, papers, materials, or other property which they may desire.

"This written permission is being given by me to the above agents voluntarily and without threats or promises of any kind."

It was signed by Bolger and witnessed by O'Shea. The agents rely on this document to justify the search of Bolger's house and the seizure of property found there.

The testimony is in conflict as to the circumstances under which Bolger signed the consent.

After considering the conflicting testimony and evaluating the credibility of the witnesses, I find that Bolger refused to sign the consent to search without consulting a lawyer. The agents told him in substance that, considering the information they had already obtained, the consent form was unnecessary and they could search without it but that he might as well sign it to save them trouble. Bolger then signed the form.

Bolger had previously asked Loughman how his present difficulties would affect his longshoreman's and hiring agent's licenses issued by the Waterfront Commission. Loughman told Bolger that he had nothing to do with Waterfront Commission and could promise him nothing but that when the Waterfront Commission examined Bolger's case they would probably take his cooperation with the Customs Service into account.

[fol. 15] Shortly before 11 a. m. Patterson, Conlon, O'Shea and Bolger left 54 Stone Street in a government car for Bolger's house in Keansburg, New Jersey. They arrived about noon. Bolger's wife was there with two guests and their children who were spending the weekend. Bolger briefly explained to his wife why the agents were there. Then, at O'Shea's direction he led O'Shea to a bedroom closet where there were some seventy-five bottles of liquor. O'Shea then searched other parts of the house. During most of the search Bolger remained in the dining room with one of the other agents and Mrs. Bolger accompanied O'Shea. O'Shea removed various other items, including perfumes, gloves, handkerchiefs, linens, porcelain figurines, cloth and costume jewelry. In Mrs. Bolger's bedroom closet he found a Stenorette tape recording machine made in West Germany.

Bolger was asked if he wanted to have some lunch but said he did not. Bolger, Patterson, Conlon and O'Shea left for New York at about 2 p. m., the search having taken some two hours. They took with them all the articles which they had found in Bolger's house which they suspected were acquired illegally.

On the way back to New York they stopped for lunch. Bolger was offered food but had only a bottle of soda. This was all he had from the time he was first detained at 8:30 a. m. until he was released at 7:30 p. m. that night.

The group arrived back in New York about 4 p. m. and went directly to 201 Varick Street, headquarters of the Customs Service.

The Waterfront Commission, which worked in close cooperation with the Customs Service, had been informed of Bolger's detention.

About ten minutes after Bolger arrived at Varick Street he was questioned briefly by Machry, a Waterfront Commission detective, and was asked to show his hiring agent's and longshoreman's license.

[fol. 16] Loughman and Cleary, another Waterfront detective, were standing nearby. They asked Bolger to produce his key ring. Bolger told them that one of the keys was to a tool room in the basement of an apartment house on 75th Street and West End Avenue which he occasionally used to repair pier equipment. Loughman and Cleary decided to investigate this story. They drove Bolger to the basement tool room in a Waterfront Commission car, ordered Bolger to open the room and searched it. Finding nothing suspicious they return to Varick Street with Bolger about 5:45 p. m. A few minutes later he was asked if he was willing to make a statement concerning the merchandise seized from his home. Apparently he did not demur.

After telling him that he did not have to make a statement and that anything said could be used against him, he was sworn, and Loughman and O'Shea proceeded to question him. Mrs. Zacha, a Customs Service reporter, took down the questions and answers verbatim. Cleary, the Waterfront Commission detective, was present throughout the questioning and could have participated though he did not do so.

Bolger admitted that with the exception of a few items which he had bought from crew members he had found most of the merchandise taken from his house on piers where he was working and had removed it. He also said that he had found the Stenorette tape recorder "bunked" on a lighter moored at one of the piers.

At the conclusion Bolger was asked whether he had voluntarily granted permission to search his house and whether the statement was made voluntarily without "duress, threats or other form of intimidation or promise of reward." He replied that it was. The statement was transcribed but was never shown to Bolger and was unsigned.

The questioning concluded about 7 p. m. Bolger was permitted to leave at 7:20. One of the customs officers

drove him back to 54 Stone Street where his car was parked and he drove off about 7:30.

[fol. 17] Before he left he was warned to keep himself available for further questioning. However, he was not questioned further and no charges were ever lodged against him by the federal authorities.

Although a United States Commissioner was sitting in the United States Court House, a short distance away, from 11 a. m. to 1 p. m. on that day, no effort was made to bring Bolger before the commissioner, or before any of the judges of the court who might have been available. Nor was there any attempt to obtain a search warrant. At no time was counsel available to Bolger, although he indicated he wanted to consult counsel before signing the "consent" to search and, at least twice, was refused the use of a telephone. At no time was he advised of his right to arraignment; to a hearing before a commissioner, or to consult counsel.

A month later Bolger was arrested by the New York City police upon a charge of grand larceny for the theft of the Stenorette tape recorder which was among the articles seized by the customs officers at his house on September 12. This charge, now reduced to petty larceny, is scheduled for trial in the Court of Special Sessions of the City of New York. As the result of this charge the Waterfront Commission subsequently suspended temporarily Bolger's licenses as hiring agent and longshoreman. Hearings on the revocation of these licenses have been deferred until after the disposition of the larceny charge in the Court of Special Sessions. The trial in Special Sessions has been deferred pending decision of the present actions.

II. THE FIRST ACTION (CIVIL No. 153-182)

a. *Jurisdiction*

The question of jurisdiction lies at the threshold of Bolger's action against the agents of the federal Customs Service and the Waterfront Commission detective Chary. [fol. 18] All the defendants contend that this court has no jurisdiction of the subject matter of the action. The

considerations affecting Cleary, who is employed by the Waterfront Commission will be discussed separately.

Plaintiff asserts that jurisdiction rests on *Reav*, United States, 350 U. S. 214. There a federal agent had seized marijuana under a search warrant issued by a United States commissioner as authorized by Rule 41(a) of the Federal Rules of Criminal Procedure. The warrant was improperly issued under Rule 41(c) since it was insufficient on its face, no probable cause existed, and the affidavit was based on unsworn statements. Petitioner was indicted by a federal grand jury for unlawful acquisition of marijuana. The district court granted a motion to suppress the evidence as to the seized marijuana on the ground that it was obtained by an unlawful search and seizure and the federal indictment was later dismissed on the Government's action. The marijuana seized was contraband and no motion was made for its return.

Thereafter the federal narcotics agent swore to a complaint in the New Mexico State Court charging petitioner with illegal possession of marijuana in violation of state law. He was arrested on that charge and awaited trial in the state court. The case against him would have been made by testimony of the federal agent based on the unlawful search and seizure.

Petitioner brought a proceeding in the district court to enjoin the federal narcotics agent from testifying in the state court as to the narcotics obtained in the unlawful search. His application for such relief was denied by the district court and the Court of Appeals affirmed (10 Cir., 218 F. 2d 237.)

The Supreme Court held, five to four, that the motion to enjoin should have been granted. Mr. Justice Douglas, writing for the majority, said that the case did not raise constitutional questions but concerned "our supervisory [fol. 19] powers over federal law enforcement agencies" which the federal courts should exercise to prevent violations by federal agents of the Federal Rules of Criminal Procedure governing searches and seizures. He went on to say (p. 217):

"No injunction is sought against a state official. The only remedy asked is against a federal agent

who, we are told, plans to use his illegal search and seizure as the basis of testimony in the state court. To enjoin the federal agent from testifying is merely to enforce the federal Rules against those owing obedience to them."

Defendants, on the other hand, urge that the later case of *Wilson v. Schnettler*, 7 Cir., 275 F. 2d 932, cert. granted 363 U. S. 840, controls and that under it the district court has no jurisdiction over this action and may not grant the relief sought.

In the *Wilson* case petitioner had been arrested and searched without a warrant by federal narcotics agents who had seized narcotics found on his person. No federal warrant had been applied for and there was no indictment or charge against the defendant in the federal courts. He was indicted by a state grand jury and charged with unlawful possession of narcotic drugs. He brought on a motion in the state court before which his case was pending for suppression of the evidence obtained by the allegedly unlawful search and seizure, which was denied.

Petitioner then brought a proceeding in the federal district court against the federal narcotics agents based on the *Rea* case, seeking judgment declaring that his arrest and search without a warrant was in violation of his rights under the Constitution and the Federal Rules of Criminal Procedure. He also sought to impound the seized narcotics, and to enjoin the agents from testifying with respect to such evidence in the pending criminal proceedings in the state court.

[9]. 20] The Court of Appeals of the Seventh Circuit found that the case "squarely raises the question asked by the dissenting minority in the *Rea* case [per Mr. Justice Harlan]: 'Would the Court's decision have been different had there been no search warrant at all?'" It reached the conclusion that the decision would have been different.

It reasoned that in the absence of a federal warrant and a charge against the defendant in the federal courts, the federal courts had no power to restrain a federal agent from testifying in a state criminal proceeding. The court held that "the criticized activities of these officers were not and have never been brought within the effective

sphere of federal judicial supervision" (*supra* at p. 935), and that to enjoin the federal agents from testifying in a state proceeding with respect to evidence obtained by them through unlawful search and seizure would be an unwarranted interference with state administration of criminal justice not authorized by the *Rea* case.

The leading case on non-interference by the federal courts in state criminal proceedings is *Stefannelli v. Minard*, 342 U. S. 117.

There the Supreme Court, per Mr. Justice Frankfurter, held that federal courts should refuse to enjoin the use in a state criminal trial of evidence obtained by state officers through unlawful search and seizure. Mr. Justice Frankfurter emphasized that the delicate balance between the states and the federal government in the enforcement of the criminal law required that such relief against state officers should be denied as a matter of discretion even if the district court had power to grant it, in view of the dangers of exposing "every state criminal prosecution to insupportable disruption". (*Supra*, at p. 123.)

The latest application of the *Stefannelli v. Minard* doctrine, was in *Pugach v. Dollinger*, 2 Cir., 277 F. 2d 739, cert. granted 363 U. S. 836, where the Court of Appeals of this circuit, relying on the *Stefannelli* case, upheld my refusal below to enjoin the use of wiretap evidence in a [fol. 21] state prosecution which was obtained by state officers in violation of Section 605 of the Communications Act of 1934, 47 U. S. C. § 605.

I am deeply sensitive of the necessity for preserving the delicate balance between the states and the federal government in this area and of leaving to the states the enforcement of state criminal law without intervention by the federal courts. See my opinion below in *Pugach v. Dollinger*, 180 F. Supp. 66, and cases there cited. I am also well aware of the difficulties and dangers which would result from such intervention which were so cogently pointed out by Mr. Justice Frankfurter in the *Stefannelli* case.

The distinctions between the case at bar and the *Rea* case are much the same as those relied on in *Wilson v.*

Schnettler. In both the case at bar and in the *Wilson* case, as distinguished from the *Rea* case, no federal warrant had been issued or even sought, no federal criminal proceeding had ever been brought, and no federal charge had ever been laid against the petitioner. If the reasoning of *Wilson v. Schnettler* were valid it would have to be concluded that the *Rea* case does not authorize the proceeding at bar and that the district court should refuse to grant the relief sought to avoid undue interference with the state administration of criminal justice.

I do not agree with the reasoning of *Wilson v. Schnettler* and I do not follow it.

In the first place I do not see that the case at bar involves undue interference with state administration of justice under *Stefannelli v. Minard*. The court in the *Rea* case expressly stated that its decision did not run counter to its *Stefannelli* decision. The opinion pointed out that the district court was "not asked to enjoin state officials nor in any way to interfere with the state agencies in enforcement of state law". The only question was as to the exercise of the supervisory powers of the district courts over federal law enforcement agencies.

[fol. 22] Such powers were to be used to police the requirements of the Federal Rules of Criminal Procedure to make "certain that they are observed". The *Rea* case teaches that the federal courts have the obligation to exercise such power so as "to enforce the federal rules against those owing obedience to them".

While the Federal Rules of Criminal Procedure are primarily designed to "govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings" (Rule 1), this is not their only function. The *Rea* opinion says in so many words that the rules "prescribe standards for law enforcement" and "are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures be satisfied". "The obligation of the federal agent is to obey the Rules," and "they are designed as standards for federal agents."

The question asked by Mr. Justice Harlan in his dissent in the *Rea* case as to whether the decision would have

been different had there been no warrant at all, seems to me to have been rhetorical and to have assumed a negative answer. I disagree with the view of *Wilson v. Schnettler* that the answer would have been in the affirmative.

Given the premises of the *Rea* case, it does not seem to me of any controlling significance whether the federal agents conducted an unlawful search and made an unlawful seizure under a defective warrant issued by a United States Commission, or under no warrant at all. In either case they would be acting in violation of the rules governing searches and seizures. In either case they would be acting contrary to their obligation to obey such rules. In either case the federal courts would have both the power and the obligation to police the rules and to make certain they are obeyed. In either case to restrain a federal agent from testifying in a state court as to evidence so unlawfully obtained would be "merely to enforce the federal rules against those owing obedience to them".

[fol. 23] It would be an anomaly to hold that equitable relief should be granted where federal agents had made at least an attempt to obey the rules though they had secured an invalid process and that relief should be denied where the agents had flouted the rules by making no attempt to obtain a warrant at all. Such a result would leave federal agents free to act as they pleased in violation of the rights of citizens by totally ignoring their obligations to obey the rules. It would place a premium on the flouting of the rules by federal agents which is specifically condemned in the *Rea* case.

It was anomalies of this nature which recently led the Supreme Court to re-examine the validity of the so-called "silver platter" doctrine in *Elkins v. United States*, 364 U. S. 206. Upon such re-examination it held that evidence obtained as a result of an unreasonable search and seizure by state officers, without any involvement of federal officers, was no longer admissible in the federal courts despite long-standing precedents to the contrary. As the court said (pp. 221-2):

"Free and open cooperation between state and federal law enforcement officers is to be commended and

encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered."

If the grant or denial of relief under the *Rea* case depended on whether the federal agents at least attempted [fol. 24] to obey the rules by obtaining a warrant even though invalid, or flouted them entirely by obtaining no warrant at all, there would be every "inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation". (p. 222). There would be an implicit invitation to federal officers, acting in association with state officers, to violate both the federal rules and constitutional guarantees. They would be encouraged to bypass the federal courts entirely in cases where the only evidence was that which could be obtained unlawfully and to turn such evidence obtained in violation of the federal rules directly over to state law enforcement authorities and thus use the fruits of their unlawful acts.

Nor do I find anything in the *Rea* case which holds that relief was dependent on the commencement or pendency of a criminal proceeding in the federal courts. In fact, when the motion in the *Rea* case was made the criminal proceedings against the petitioner had been dismissed on motion of the government and no proceedings of any kind were pending before the district court.

The concept that the district courts have inherent power to enforce the long-standing practices embodied in the federal rules, in the absence of any criminal or other proceedings before the court, is not startling or novel. In *Grant v. United States*, 2 Cir., — F. 2d — (decided July 28, 1960), Judge Friendly recently had occasion to discuss the nature of a motion made under Rule 41(e) for the

suppression and return of evidence unlawfully seized which was made before any criminal proceedings had been commenced or any application had been made to the district court by the government. In the course of his opinion Judge Friendly said:

"We have said that such a motion 'was in effect a complaint initiating a civil action,' *Lapides v. United States*, 215 F. 2d 253, 254 (2d Cir., 1954); *Russo v. United States*, 241 F. 2d 285, 287 (2d Cir.) *cert. denied*, 355 U. S. 816 (1957), and so it is in the sense [fol. 25] with which the Court was there mainly concerned, namely, its independence from the later criminal proceeding and the consequent appealability of a final order therein under 28 U. S. C. § 1291. However, the jurisdictional grants in 28 U. S. C. §§ 1331-58 will be searched in vain for any rubric under which such a motion fails, in the absence of any allegation of jurisdictional amount that would bring it under § 1331, see *Centracchio v. Garrity*, 198 F. 2d 382, 385 (1st Cir. 1952), *cert. denied*, 344 U. S. 866 (1952)."

Judge Friendly went on to say, citing Judge Hough in *United States v. Maresca*, D. C. S. D. N. Y., 266 Fed. 713, 717, that jurisdiction over such a proceeding derives from "the inherent disciplinary power of any court" over its own officers.

As the *Rea* case makes clear, the right to relief against violation of the rules by federal agents, like the right to relief discussed in the *Grant* case, derives from inherent powers of the court. It is not dependent upon whether or not a criminal proceeding against the petitioner is pending.¹

It may be noted that in 1957, subsequent to *Rea v. United States* and to *Centracchio v. Garrity* cited by Judge Friendly in the *Grant* case, Congress added a new subdivision 4 to Section 1343 of the Judicial Code, 28 U. S. C. § 1343, which conferred original jurisdiction on the district courts over any civil action authorized by law to be commenced by any person.

"(4) to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote."

There is no doubt that the Federal Rules of Criminal Procedure, in

[fol. 26] Thus I conclude that under *Rea v. United States* I have power to grant the relief sought and that if the record before me establishes that evidence was obtained by the defendant federal agents through an unlawful search and seizure, I have the obligation to restrain the agents from producing such evidence or testifying with respect to it in the state courts.

Thus far the discussion has centered about the evidence claimed to have been obtained by unlawful search and seizure. In addition, however, Bolger claims that he was unlawfully detained by the federal agents in violation of Rule 5(a) of the Federal Rules of Criminal Procedure, and that during such detention highly incriminating statements were obtained from him. He also seeks to enjoin the federal agents from producing such statements or from testifying about them in the state proceedings.

Rule 5(a) of the Federal Rules of Criminal Procedure provides:

"An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

Under the familiar McNabb-Mallory rule unreasonable delay in bringing a person before a commissioner is a violation of Rule 5(a), and constitutes a wilful disobedi-

so far as they relate to searches and seizures and to the necessity for bringing an arrested person before a commissioner without unreasonable delay, may be considered as acts of Congress providing for the protection of civil rights. See *Iovino v. Waterson*, 2 Cir., 274 F. 2d 41; *Rea v. United States*, *supra*. If any statutory authority is needed to confer on the district courts jurisdiction over actions to enforce the substantive rights held to exist in *Rea*, it may well be found in the new subdivision 4. Cf. generally, *Douglas v. City of Jeannette*, 319 U. S. 157; *Hague v. C. I. O.*, 307 U. S. 496.

ence of law by the offending officers. Incriminating statements obtained from defendants during the period of such unlawful detention are inadmissible in federal criminal proceedings. *Mallory v. United States*, 354 U.S. 449; *McNabb v. United States*, 318 U.S. 332.

[fol. 27] Like Rule 41 dealing with searches and seizures, Rule 5(a) is a rule which federal agents are bound to obey, as the *Mallory* and *McNabb* cases make clear. If this rule is violated by federal agents the doctrine of the *Rea* case comes into play and the same principles govern as apply to evidence obtained by unlawful search and seizure in violation of Rule 41. Thus this court has the obligation to restrain federal agents from producing or testifying in state proceedings as to evidence obtained in violation of Rule 5(a), as well as of Rule 41.

b. *The violations of the Federal Rules*

We thus come to the question of whether the evidence before me establishes that the federal agents violated the Federal Rules of Criminal Procedure, and, if so, in what respects. Plaintiff complains (1) that Rule 4 was violated by his initial detention and arrest without warrant; (2) that Rule 41(a) was violated when his home in Keansburg, New Jersey, was searched without a warrant and property there seized; and (3) that Rule 5(a) was violated when the agents failed to bring him before a United States Commissioner without unnecessary delay and held him for an unreasonable length of time, without arraignment, during which time incriminating statements were extracted from him.

As in most cases where such claims are made resolution of the questions presented requires a careful evaluation of the conduct of the officers involved. See *Go-Bart Co. v. United States*, 282 U.S. 344; *Rios v. United States*, 364 U.S. 253.

1. THE INITIAL DETENTION AND ARREST

When Customs enforcement officers Paterson and Conlon observed Bolger leaving deserted pier 56 in the early morning of September 12, 1959 he was carrying a carton [fol. 28] which he placed in his car parked nearby. The

officers had information that liquor was being unlawfully removed from the piers and were on the lookout for such violations of law.

Under the Tariff Act of 1930, 19 U. S. C. §§ 482, 1581, custom officers are entitled to conduct searches of very broad character for merchandise introduced into the United States contrary to law. Under Section 482 they may "stop, search and examine . . . any vehicle, beast or person on which or whom he or they shall suspect there is merchandise which is subject to duty or shall have been introduced into the United States in any manner contrary to law, . . ." Section 1581 gives them authority to examine, inspect and search any vessel or vehicle and any person, package, or cargo on board and they may hail and stop such vessel or vehicle and use all necessary force to compel compliance.

The officers had reason to suspect that Bolger was unlawfully removing liquor from Pier 56 and taking it away in his car. Neither warrant nor arrest was needed to conduct a search of his automobile in these circumstances. Such a search is not unreasonable nor does it violate constitutional standards.² See *Landau v. United States Attorney*, 2 Cir., 82 F. 2d 285, *cert. denied* 298 U. S. 665; *United States v. Yee Ngoo How*, D. C. N. D. Calif., 105 F. Supp. 517; *Boyd v. United States*, 116 U. S. 616.

[fol. 29] While the search of the car did not turn up any liquor, Bolger admitted to the officers that he had at his house six or eight bottles of liquor from ships' stores acquired from crew members. Such acquisition of liquor is in violation of Custom regulations and is illegal. 19

² I do not pass on the question of whether the initial stopping and search of the car would have been justified in the absence of the Customs enforcement statutes. Cf. *Henry v. United States*, 361 U. S. 98, suggesting that such a search might be justified if agents observed that suspicious "packages had been taken from a terminal or from an interstate trucking platform"; *Ries v. United States*, 364 U. S. 253, suggesting that a car may be stopped for the legitimate "purpose of routine interrogation" and with no intent to detain the occupant "beyond the momentary requirements of such a mission" (p. 262), and that if as a result the suspect revealed facts constituting reasonable cause for arrest, he might then be lawfully arrested.

C. F. R. § 23.4; 18 U. S. C. § 545.³ Bolger's admission that he possessed liquor illegally, acquired gave the officers probable cause to believe that he had committed a crime and justified their arresting him, see *Rios v. United States*, 364 U. S. 253.

There is no doubt that they did so despite their insistence that they had merely "detained" him. The officers admitted that had Bolger attempted to leave they would have forcibly detained him. Arrest is not a question of semantics and this was an arrest no matter what the officers chose to call it.⁴

The arrest took place shortly after 9 a.m., immediately after the search of Bolger's car had been completed.

2. THE SUBSEQUENT DETENTION

When the officers arrested Bolger they were commanded by Rule 5(a), F. R. Cr. P., to bring him before a Commissioner without unnecessary delay so that he could be arraigned, informed of his rights, consult with counsel, have a hearing and be admitted to bail. (Rule 5(b).) They took him to the headquarters of the Customs Enforcement Service and kept him there from about 9:30 a.m. until shortly before 11 a.m., when they started for his house at Keansburg to make the search. In the interim they questioned him, obtained further admissions about [fol. 30] merchandise in his house, and induced him to sign a form purportedly giving his consent to a search of his house. Up to that time no one had advised him of his rights, he had been refused the use of a telephone, and he had had no opportunity to communicate with his friends or relatives, or with counsel. Keansburg was an hour's drive away and it took at least two hours to get there and back, quite apart from the time necessary for a search.

³ Liquor bought by seamen from ship's stores cannot be transferred and is solely for the seaman's bona fide personal use. 19 C. F. R. § 23.4.

⁴ See *Worden v. Davis*, 195 N. Y. 391; *Stevens v. O'Neill*, 51 App. Div. 364, aff'd 169 N. Y. 375. New York law is applicable under the rule of *United States v. Di Re*, 332 U. S. 581. See, also, *United States v. Perez*, 2 Cir., 242 F. 2d 867.

On this Saturday morning a United States Commissioner before whom Bolger could have been brought, was present at the United States Court House only a few blocks away from 11 a.m. to 1 p.m. In any event, the federal court house was open and there is always a judge sitting *ex parte* available on Saturday morning before whom Bolger could have been arraigned had no commissioner been available. In all probability other federal judges would have been available throughout the day.

However, no attempt whatsoever was made to arraign Bolger as the rules required. Instead he was whisked off on a trip to New Jersey 30 miles away. When the agents started on this expedition with Bolger shortly before eleven it was plain that they had no intention of arraigning him "without unnecessary delay". There was nothing voluntary about Bolger's stay in enforcement headquarters nor about his trip to New Jersey with the officers. He was told what to do and where to go and he did what he was told. He could not have been expected to do anything else under the circumstances.

While his detention at Stone Street up to 11 o'clock, when the commissioner became available at the court house, may have been justifiable, it is plain that his detention without arraignment was not justified thereafter. Instead of starting on the trip to New Jersey, which was bound to take several hours, Bolger should have been taken before the commissioner and the procedure for the protection of his rights prescribed by Rule 5 set in motion. [fol. 31] I find that Bolger's detention after the commencement of the trip to New Jersey shortly before 11 o'clock in the morning of September 12, 1959 constituted unreasonable delay in bringing him before a commissioner in violation of Rule 5(a) and that such unreasonable delay continued until he was released at 7:30 p.m., some 8½ hours later, without any charges whatsoever having been made against him.

3. THE SEARCH AND SEIZURE

As I said in *United States v. Martin*, D. C. S. D. N. Y., 176 F. Supp. 262 (at pp. 266-7):

"Consent to a search may constitute a waiver of the rights secured by the Fourth Amendment: See *United States v. Dornblut*, 2 Cir., 261 F. 2d 949; *United States v. Gross*, D. C. S. D. N. Y., 137 F. Supp. 244; *United States v. Reckis*, D. C. D. Mass., 119 F. Supp. 687. Cf. *United States v. Sclafani*, 2 Cir., 1959, 265 F. 2d 408. - However, in order for consent to constitute a waiver the burden is on the United States to show by clear and convincing evidence that it is unequivocal and specific and freely and intelligently given. *United States v. Reckis*, supra; *United States v. Wallace*, D. C. D. C., 160 F. Supp. 859. It must be affirmatively shown that there was no duress or coercion, actual or implied. 'Invitations' to enter one's house, extended to armed officers of the law who demand entrance are usually to be considered as invitations secured by force.' *Judd v. United States*, 89 U. S. App. D. C. 64, 190 F. 2d 649, 651; *United States v. Gross*, supra; *United States v. Minor*, D. C. E. D. Okl., 117 F. Supp. 697.

"Mindful of this . . . 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights' (*Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461) . . ."

[fol. 32] The defendants here had the burden of showing by clear and convincing evidence that a consent to search "was unequivocal and specific and freely and intelligently given". I find that the defendants have failed to sustain this burden.

Bolger, already twice denied the right to telephone, and cut off from access to relatives or counsel in enforcement headquarters, had been talked to by four agents by the time he signed the consent. He had made serious admissions. He testified that he was confused and apprehensive and I believe him. He was also worried about possible repercussions which might affect his Waterfront Commission licenses under which he earned his livelihood, and had discussed such possibilities with O'Shea.

He refused to sign the consent without consulting a lawyer. He was then induced to do so on the representation by the agents that they had the right to search any-

way and, by implication at least that a lawyer would avail him nothing. This was plainly not true. If properly advised he would have known that there was no right to search without a warrant.

The consent to search and seizure without a warrant was not "unequivocal" nor was it freely and intelligently given. It did not constitute a valid waiver of Bolger's rights.

It is not necessary to have force or threat to vitiate a consent to search. Consent to search is not valid when based on misrepresentations made by government agents. *Gouled v. United States*, 255 U.S. 298.

I hold that the consent form which Bolger was induced to sign without benefit of counsel was void and of no effect and did not authorize the agents to search his home in New Jersey. The search conducted without a warrant, easily obtainable had the agents followed the mandate of Rule 41(a), and the seizures which resulted from the search were unlawful and in violation of Bolger's rights. *Johnson v. United States*, 333 U.S. 10; *Amos v. United States*, 255 U.S. 313; *United States v. Arrington*, 7 Cir., 215 F. 2d 630; *United States v. Minor*, D.C. E.D. Okl., 117 F. Supp. 697.

The later conduct of Bolger cannot be viewed as a consent to the search. As I have said, Bolger was in the hands of the agents and was in no position to do other than what he was told to do. The fact that he did not make further protest, accompanied the agents, and was there during the search, was plainly because, having signed the consent, he believed the agents had authority to make the search and he was then prepared to make as little trouble for them as possible.

Moreover, by the time he reached his house in New Jersey, about noon, he had already been under detention for an unreasonable length of time in violation of Rule 5(a). It may well be that the McNabb-Mallory rule invalidates any consents to search by conduct or otherwise given during such a period. See *Watson v. United States*, D.C. Cir., 249 F. 2d 106.

4. THE INCRIMINATING STATEMENTS

At about 6 p.m. Bolger was questioned under oath by the agents before a Customs Service reporter who took a transcript of his testimony. The questioning lasted until 7:20. By the time the questioning began more than nine hours had elapsed since Bolger was first detained. At no time had he been advised of any of his constitutional or statutory rights. He had been refused the opportunity to obtain counsel. His home had been unlawfully searched and property had been unlawfully seized. He had been compelled to participate in another unlawful search. He had been under intermittent interrogation throughout the day by four agents and two Waterfront detectives and had been subjected to great strains and tensions.

[fol. 34] While Bolger had a native shrewdness he showed evidence of only a limited education. According to agent O'Shea, Bolger had admitted that he was drunk the night before and had spent the night sleeping in his car, an episode which could scarcely have left him at his best.

No attempt whatsoever had been made to bring him before a United States Commissioner in compliance with Rule 5(a) and he had been induced to sign a consent to search which was wholly invalid.

The statement taken from him between 6 and 7:20 p.m. was highly incriminating both as to the merchandise seized generally and as to the Stenorette tape-recording machine which is the subject of the pending charge in the state courts.

It needs no further discussion to demonstrate that the incriminating statement was the result of a clear violation of Rule 5(a) of the Federal Rules of Criminal Procedure by the agents and of the illegal search and seizure, and I so find. The same applies to any other incriminating statements made by him after he left with the agents for New Jersey when his unlawful detention began. See *Mallory v. United States*, *supra*; *McNabb v. United States*, *supra*.

5. REMEDIES AGAINST THE FEDERAL AGENTS

I find (1) that on September 12, 1959 the defendant federal agents violated Rule 41(a) of the Federal Rules of

Criminal Procedure by conducting an unlawful search of the plaintiff's house and unlawfully seizing property found there without a warrant, and (2) that on September 12, 1959 such defendant agents violated Rule 5(a) of the Federal Rules of Criminal Procedure by unlawfully detaining plaintiff for an unreasonable length of time without taking him before a commissioner, and obtained incriminating statements from him as a result of such unlawful detention.

[fol. 35] I am therefore required in the exercise of the supervisory powers of this court over federal law enforcement officers, to enforce obedience to the Rules of Criminal Procedure by enjoining the defendant agents from testifying in the state criminal proceedings with respect to any evidence obtained as a result of their unlawful conduct. Defendants O'Shea, Loughman, Conlon and Patterson will therefore be enjoined from testifying in the state criminal proceedings with respect to any evidence obtained during the illegal search and seizure conducted at Bolger's house in Keansburg, New Jersey, on September 12, 1959 and from turning over to state law enforcement authorities and producing in any state criminal proceeding any property seized at Bolger's house on that day, including the Stenorette tape recording machine.

Defendants O'Shea, Loughman, Conlon and Patterson and defendant Zecha, the Customs Service reporter, will be enjoined (1) from testifying as to any statements made by the plaintiff after his departure from enforcement headquarters at 54 Stone Street shortly before 11 a.m. on September 12, 1959, including the statement in question and answer form taken from the plaintiff beginning at or about 6 p.m. on that day, and (2) from turning over the transcript of any statement or statements taken from plaintiff during such period to state law enforcement authorities or from producing such transcript in any state criminal proceedings.

Since the proceedings before the Waterfront Commission relating to the revocation of the plaintiff's licenses as longshoreman and hiring agent will also vitally affect his rights, a similar injunction will issue with respect to giving testimony or producing evidence or statements at

any hearings before that Commission. *Cf. Burack v. State Liquor Authority*, D. C. E. D. N. Y., 160 F. Supp. 161.

[fol. 36]

6. THE RELIEF SOUGHT AGAINST DEFENDANT CLEARY

Defendant Cleary, who questioned Bolger briefly on his return from New Jersey, accompanied him on the search of the 75th Street house and was present throughout the taking of the question and answer statement before the Customs Service reporter between 6 and 7:20 p. m. While Cleary did not participate in the questioning he was free to do so.

Plaintiff seeks to restrain Cleary also from testifying in state proceedings as to the statement obtained from him.

Cleary, of course, is not a federal agent or employee. He is not bound to obey the Federal Rules of Criminal Procedure. He was present at the questioning as a representative of the Waterfront Commission, a bi-state agency of the States of New York and New Jersey as a result of information from the Customs Service to the Commission concerning the Bolger case. This was the result of the commendable cooperation between the Customs Service and the Commission who were both concerned with law enforcement on the waterfront.

The question of whether relief should be granted against Cleary is a difficult one. The *Rea* opinion expressly distinguished that case from *Stefannelli v. Minard* on the ground that no relief was asked for against state law enforcement officials. Certainly the *Stefannelli* case would preclude injunctive relief against Cleary in his capacity as a state law enforcement officer had he not been present at the taking of the statement.

But does this conclusion leave the plaintiff without remedy under the circumstances? If it did the injunction issued against the federal officers would be rendered in large part ineffective in so far as the incriminating statement made by Bolger is concerned. Cleary was present throughout that statement. No doubt he paid close attention to Bolger's admissions concerning his acquisition of the Stenorette tape-recording machine which is the subject

[fol. 37] of the state larceny charge. In effect, Cleary was a human recorder of the questions which were put to Bolger and the answers which he gave.

If no injunction can be issued against Cleary he is in a position to testify in the state court proceedings as to Bolger's admissions before the federal agents and thus to act as a vehicle to defeat the policy enunciated in the *Rea* case of protecting the privacy of the citizen against invasion in violation of the federal rules. Thus, the federal agents would be able to flout the rules and to use the fruits of their unlawful conduct in the state proceedings through the medium of Cleary.

Cleary was present at the questioning by invitation of the Customs Service. Indeed, his presence might have been an additional inducement to Bolger to answer questions more freely since Bolger had already shown concern to agent Loughman about the effect his predicament might have on his vital Waterfront Commission licenses.

In *Elkins v. United States*, *supra*, the Supreme Court noted that in the course "of the entirely commendable cooperation between federal and state law enforcement agencies" it was often difficult in practice to determine where federal activity ended and state activity began. The court gave as examples, *Byers v. United States*, 273 U. S. 28, in which evidence was excluded where the participation of a federal agent in an unlawful search by state officers was "under color of his federal office" and the search "in substance and effect was made a joint operation of the local and federal officers", (273 U. S. at 33), and *Gambino v. United States*, 275 U. S. 310, where evidence illegally seized by state troopers, was excluded in the federal courts because the court found that "the wrongful arrest, search and seizure were made solely on behalf of the United States". (275 U. S. at 316.)

In the case at bar the wrongful activities were all those of federal officers and were conducted or directed by them. All that was done during the period of unlawful detention, [fol. 38] and particularly the taking of the incriminating statement from Bolger, was being done on behalf of the United States. Cleary was merely a witness to them. If Cleary had been a private citizen called in by the federal

agents to be a witness to incriminating statements unlawfully obtained from Bolger, he would surely not be insulated against appropriate action by the federal courts to enforce the federal rules. The fact that he was a state agent does not insulate him either or permit him to be used as a shield to enable the federal officers to violate plaintiff's rights with impunity.

I am therefore constrained to hold that an injunction must also issue against Cleary restraining him from testifying as to any statements made by Bolger during his interrogation by the federal agents. Cleary will be restrained not in his capacity as a state official but because he participated as a witness in the unlawful acts of the federal officers acting on behalf of the United States. Such participants are properly within the orbit of the power of the federal courts to enforce the rules against the federal agents owing obedience to them. Relief against them is a necessary incident of such power which the federal courts must grant under the circumstances.

7. THE RETURN OF THE PROPERTY SEIZED

Bolger's request for a direction that all of the property seized be returned to him is denied. The record before me indicates that most of the items seized were brought into the United States unlawfully and there is no showing that any of them are lawfully here. Probable cause exists for the institution of forfeiture proceedings. Notwithstanding any illegality in the seizure the burden is on the plaintiff to prove that the merchandise is not forfeitable. Leaving the merchandise in the custody of the Customs Service does not prejudice plaintiff's right to petition for remission from forfeiture and penalty. (19 U. S. C. §§ 615, 618.) Plaintiff has not established in this proceeding that he is [fol. 39] entitled to the return of any of the allegedly contraband seized merchandise. See *Trupiano v. United States*, 334 U. S. 699.

III. THE SECOND ACTION (CIVIL 60-1184)

The second action can be rapidly disposed of. The only defendants are the Waterfront Commission and its indi-

vidual members. Bolger seeks to restrain the Commission and its members from considering in the proceedings before it relating to his license any evidence unlawfully secured.

The Commission was set up under the Waterfront Commission Act enacted by the States of New York and New Jersey in 1953. (New York, Laws, 1953, c. 882 (McK. Unconsol. Laws §6700aa and following); N.J. Laws 1953, c. 203 (N. J. S. A. 32:23-1 and following).)

Part I of the Act which encompasses the Waterfront Commission Compact, an interstate compact between the States of New York and New Jersey, was submitted to and approved by Congress. (Act of August 12, 1953, c. 407, 67 Stat. 541.)

Plaintiff asserts that there is jurisdiction to grant the relief sought under the *Rea* case because the Commission and its members are federal agents who are subject to the Federal Rules of Criminal Procedure. This contention is devoid of merit.

The Waterfront Commission is a bi-state agency of the States of New York and New Jersey. The fact that Part I of the Act was approved by Congress in no way makes it a federal agency. See *Rivoli Trucking Corp. v. American Export Lines, Inc.*, D. C. E. D. N. Y., 167 F. Supp. 937. *Rea v. United States* does not authorize a proceeding to enjoin a state agency from considering evidence unlawfully obtained. Indeed, to grant such relief would run directly counter to *Stefannelli v. Minard*, *supra*, and *Pu- [fol. 40] gach v. Dollinger*, *supra*. The second action must be dismissed on the merits.

The foregoing opinion constitutes my findings of fact and conclusions of law.

A decree will be submitted in accordance with this opinion on five (5) days' notice.

Dated: New York, N. Y.

November 15, 1960

FREDERICK V. P. BRYAN
U. S. D. J.

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER APPEALED FROM—December 20, 1960

The plaintiff herein having served and filed his complaint demanding a permanent injunction against the above named defendants, as appears more fully by said complaint and the prayer for relief therein contained and said action and issues therein having been joined by the answer of the defendants herein, and the trial having come on before me and having been had, and after hearing the evidence adduced by the plaintiff and the defendants herein and upon due consideration thereof, it is

[fol. 41] ORDERED, ADJUDGED AND DECREED that the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon and Joseph E. Patterson are hereby enjoined from testifying in the State criminal proceedings with respect to any evidence obtained during the illegal search and seizure conducted at the house of Edward Bolger, plaintiff, in Keansburg, New Jersey on September 12, 1959 and from turning over to State Law Enforcement Authorities and producing in any State criminal proceeding any property seized at the house of Edward Bolger, plaintiff, on that day, including the Stenorette tape-recording machine, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph E. Patterson and Dorothy T. Zecha are hereby enjoined from testifying as to any statements made by the plaintiff, Edward Bolger, after his departure from Enforcement Headquarters of the United States Customs at 54 Stone Street, City, County, State of New York and the Southern District of New York at about 11 o'clock A. M. on September 12, 1959, including the statement in question and answer form taken from the plaintiff beginning at about 6 o'clock P. M. on that day, and from turning over the transcript of any statement or statements taken from the plaintiff herein, Edward Bolger, during such period to State law enforcement authorities, or from

producing such transcript in any State criminal proceedings, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph Patterson, Dorothy T. Zecha and Michael Cleary are hereby enjoined with respect to transactions and statements subsequent to 11:00 A. M. on September 12, 1959 [fol. 42] from giving any testimony or producing any statements in question and answer form, or other statements or producing any evidence before the Waterfront Commission of New York Harbor at any hearing or trial conducted by the said Waterfront Commission of New York Harbor against the said plaintiff, Edward Bolger, with respect to any statements, in question and answer form made on September 12, 1959 and producing any property illegally seized during the unlawful search of plaintiff's house at Keansburg, New Jersey on September 12, 1959, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant Michael Cleary is hereby enjoined from giving any testimony or producing any evidence or statements either oral or in question and answer form obtained by him from defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph E. Patterson and Dorothy T. Zecha on September 12, 1959 in any State criminal proceedings against the plaintiff herein, Edward Bolger, with respect to any statements, including the statement in question and answer form while the plaintiff was illegally detained at 201 Varick Street, City, County, State of New York and the Southern District of New York on September 12, 1959, and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff Bolger's application for an order directing the return to him, of the properties seized by defendants William J. O'Shea, Walter J. Conlon and Joseph E. Patterson at plaintiff's home at Keansburg, New Jersey on September 12, 1959 be and hereby is denied and that the said merchandise be retained in the possession, custody and control of the Collector of Customs of the Port of New York for disposition in accordance with the Customs Laws and Regu-

lations, but without prejudice to such further proceedings by the plaintiff with respect to such properties as may be authorized by law, and it is further

[fol. 43] ORDERED AND ADJUDGED that the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph E. Patterson, Dorothy T. Zecha and Michael Cleary pay the costs of these proceedings, exclusive of plaintiff's attorney's fees, as taxed by the Clerk.

Dated: New York, N. Y., December 20, 1960.

FREDERICK V. P. BRYAN,
U. S. D. J.

Rec'd in Clerk's Office: 12/21/60.

Judgment Entered: 12/21/60.

HERBERT A. CHARLSON,
Clerk.

[fol. 44]

[fol. 45]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 402—October Term, 1960
Argued May 25, 1961

Docket No. 26826

EDWARD BOLGER, PLAINTIFF-APPELLEE

—v.—

MICHAEL CLEARY, DEFENDANT-APPELLANT

Before:

CLARK and WATERMAN, *Circuit Judges*, and
ANDERSON, *District Judge*

Appeal from the United States District Court for the Southern District of New York, Frederick van Pelt Bryan, *Judge*.

Defendant, Michael Cleary, an investigator for the Waterfront Commission of New York Harbor, appeals from an order enjoining him from testifying, in state proceedings against the plaintiff, Edward Bolger, to statements made by plaintiff during his illegal detention by federal officers, and from producing any property illegally seized during their unlawful search of plaintiff's house. [fol. 46] Opinion below reported in D. C. S. D. N. Y., 189 F. Supp. 237, *sub nom. Bolger v. United States*. Order affirmed.

IRVING MALCHMAN, Asst. to the Gen. Counsel,
Waterfront Commission of New York Har-
bor, New York City (William P. Sirignano,
Gen. Counsel, New York City, on the brief),
for appellant.

JOSEPH ARONSTEIN, New York City, *for appellee*.
FRANK D. O'CONNOR, Dist. Atty., and Benj. J.
Jacobson, Asst. Dist. Atty., Queens County,
New York, *for The New York State District
Attorneys Association, amicus curiae*.

OPINION—August 4, 1961

CLARK, *Circuit Judge*:

This case presents the question whether a federal court has the power to enjoin a state official from testifying in a state proceeding to information learned by him as a result of his co-operation with federal officials in an illegal search and seizure and an illegal detention.

The plaintiff, Edward Bolger, is a hiring agent and longshoreman licensed by the Waterfront Commission of New York Harbor and employed on the New York waterfront. On September 12, 1959, some federal customs enforcement officers were on the lookout for theft from the piers, and they observed the plaintiff take a cardboard carton from a deserted pier and place the carton in his car. In the course of their ensuing investigation, they searched plaintiff's New Jersey house in violation of Fed. R. Crim. P. 41, and obtained incriminating admissions from the plaintiff during a detention which violated Fed. R. Crim. P. 5(a). On the authority of *Rea v. United States*, [vol. 47] 350 U.S. 214, the court below enjoined the various officials involved from testifying in state proceedings to the fruits of their illegal activities. To make its decree effective, the court extended the scope of the injunction to include defendant Cleary, an investigator for the Waterfront Commission of New York Harbor. D. C. S. D. N. Y., 189 F. Supp. 237. Cleary was not present at the time of the illegal search and seizure, but, at the invitation of the Customs Service, witnessed the subsequent interrogation of the plaintiff during part of his illegal detention by federal officials. Though Cleary did not participate in the questioning, he was free to do so had he wished.

The district court enjoined Cleary from testifying, in any Waterfront Commission hearing against plaintiff, with respect to transactions and statements subsequent to 11:00 a.m. on September 12, 1959 (the time that the illegal detention and illegal search and seizure began), and from producing any property illegally seized during the illegal search of plaintiff's New Jersey house. The order also enjoined Cleary from giving any testimony or producing

any evidence in state criminal proceedings against the plaintiff with respect to statements obtained by federal officials during plaintiff's illegal detention. The present appeal is taken by defendant Cleary from that part of the district court order pertaining to him. The other defendants do not appeal, and Cleary concedes for purposes of his appeal the illegality of the conduct of the various federal officials.

Defendant's main point on this appeal is that the order below constitutes an unwarranted interference with the administration of criminal justice by the states. A federal court will not enjoin the use in state courts of evidence obtained by an unreasonable search by state police, *Stefanelli v. Minard*, 342 U. S. 177, or obtained by state police through violation of the Anti-Wire Tapping Act, *Pugach v. Dollinger*, 365 U. S. 458. On the basis of this line of [fol. 48] authority, defendant argues that the order below cannot be sustained. Defendant Cleary, an investigator for the Waterfront Commission of New York Harbor, is an official of a bistate agency of New York and New Jersey. The proceedings in which his testimony is forbidden are a state prosecution for petit larceny and a Waterfront Commission hearing to determine whether plaintiff's license as a hiring agent and his registration as a long-shoreman should be revoked. It is urged that a consideration for the proper balance between the state and federal governments requires the federal court to stay its hand in the present case, lest the work of the state courts be unduly disrupted.

The answer to this contention is that the federal courts will make an exception to this principle of noninterference in order to insure that federal officers comply with the requirements of fair criminal law administration as set forth in the Federal Rules of Criminal Procedure. In *Rea v. United States*, *supra*, 350 U. S. 214, 217, the Supreme Court directed the district court to enjoin a federal narcotics agent from testifying in a state prosecution with respect to narcotics seized by him in an illegal search. The court could assume jurisdiction in the exercise of its "supervisory powers over federal law enforcement agencies." We think the *Rea* case compels the conclusion that

the order below was proper. In *Rea*, a federal official was disabled from passing the fruits of his illegal activities on to the state through testimony at trial. In the present case the federal officials attempted to pass the fruits of their illegal activities on to the state by calling in state officials at the time of the illegal detention. If the integrity of the judicial process stated in the Federal Rules of Criminal Procedure is not to be subverted by the former method, it must be similarly protected against subversion through the latter method. The only difference between the two cases is the time at which the federal officials [fol. 49] attempt to make the results of their law-breaking available to the state. We do not think that this difference justifies a distinction in law, or justifies so easy a means of evading federal law for the protection of the accused.

Defendant attempts to distinguish the *Rea* case, 350 U. S. 214, 217, on the ground that, as the Supreme Court there pointed out, "no injunction [was] sought against a state official." But the defendant Cleary is not being enjoined in his capacity as a state official, but as a witness invited to observe illegal activity by federal agents. If the court can enjoin federal agents from passing on the fruits of their illegal activity to the state, the court has power to make its decree effective by extending the injunction to any third party invited by the federal agents to witness the securing of statements or other evidence. That the third party happens also to be a state official is not, in our view, an excusing circumstance.

The defendant also seeks to distinguish *Rea* on the ground that there the accused, prior to the commencement of the state prosecution, had been indicted under federal law, and had obtained a suppression order under Fed. R. Crim. P. 41(c) against use of the illegally obtained evidence in that or in any other prosecution. But the majority opinion in *Rea* nowhere relied on the existence of the prior suppression order, or the fact that a prior federal indictment had been brought. Nor can we see any rational justification for holding that the disability from giving testimony in state proceedings, based on the need to protect the integrity of the process stated in the

Federal Rules of Criminal Procedure, depends on the existence of a prior federal indictment or suppression order. Defendant contends that such a narrow construction of *Rea* is indicated by the recent Supreme Court decision in *Wilson v. Schneitler*, 365 U.S. 381, sustaining the dismissal of an action to enjoin federal agents from testifying in a state court and from there producing [fol. 50] narcotics seized by them. But in *Wilson* the complaint failed to allege that the seizure was illegal, and this was the basic reason for the court's failure to follow *Rea*. While the *Wilson* opinion notes that *Rea* was different in that earlier federal proceedings had occurred, the opinion declined to rely on this fact as an independent ground for distinguishing *Rea*, and ultimately rested on the insufficiency of the allegations of the complaint.

We think the *Rea* case ample authority for holding that the order appealed from is not barred by 28 U.S.C. § 2282 as an injunction to stay proceedings in a state court.

We need now to consider whether late developments may not have rendered the injunction unnecessary. When this action was pending in the court below, plaintiff had no adequate remedy in a state court, because the then prevailing doctrine of *Wolf v. Colorado*, 338 U.S. 25, and *Schwartz v. Texas*, 344 U.S. 199, permitted the states to receive evidence obtained in an unreasonable search and seizure or in violation of a federal statute. On June 19, 1961, in *Mapp v. Ohio*, 81 S. Ct. 1684, the Supreme Court overruled *Wolf v. Colorado*, *supra*, and held that state courts must exclude evidence obtained in an unreasonable search and seizure. If it were clear that *Mapp* barred all use by the state of the illegally obtained evidence here involved, the injunction below could properly be dissolved, not so much because of federal-state relations as of the traditional principle that equity will not act where there is an adequate remedy elsewhere. The scope of *Mapp* is, however, unclear in several regards, such as its application to federal statutory or rule, as well as constitutional, prohibitions or to state administrative proceedings such as those of the Waterfront Commission. Moreover, it is our understanding that a rehearing of *Mapp* is being sought, thus leaving the question still open for some

months. Hence we find no present justification for dissolving the injunction. Should the various problems left [fol. 51] unsolved by *Mapp* be clarified, so that it becomes clear that the injunction is in fact unnecessary, the district court, on application of any party in interest, may order its dissolution.

Order affirmed.

ANDERSON, *District Judge* (dissenting):

While I agree with the majority that Judge Bryan's order should be affirmed, I am of the opinion that, as a result of the intervening decision of the Supreme Court in *Mapp v. Ohio*, June 19, 1961, the injunction should now be dissolved. I must, therefore, dissent from that portion of the majority's decision which continues the injunction in effect.

The reason given in the majority opinion for not dissolving the injunction is that equity must act because there is no adequate remedy elsewhere, i.e., in this case, in the state court of New York; and the reason there is no remedy in the state court is that, while *Mapp v. Ohio* now requires state courts to exclude evidence obtained in violation of the unreasonable search and seizure provision of the Fourth Amendment, the *Mapp* case is, nevertheless, "unclear in several regards, such as its application to federal statutory or rule, as well as constitutional, prohibitions or to state administrative proceedings such as those of the Waterfront Commission." The use of the phrase "as well as constitutional" implies that *Mapp* is clear enough where the evidence sought to be used in a state court was obtained as the result of an unreasonable search and seizure. In any event, the opinion of the Court in the *Mapp* case said, "we hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." This appears to be reasonably explicit. [fol. 52] That this is also binding upon the Waterfront Commission is implicit in the Court's discussion in the *Mapp* case of the protection afforded by the Fourth Amendment to the citizens' rights to privacy. It is also

supported by civil cases to which the Fourth Amendment has been held to apply, *Rogers v. United States*, 97 F. 2d 691 (1st Cir. 1938); *Ex parte Jackson*, 263 Fed. 110 (D. Mont. 1920); *Schenck ex rel. Chow Fook Hong v. Ward*, 24 F. Supp. 776, 778 (D. Mass. 1938); *Tovar v. Jarecki*, 83 F. Supp. 47 (N. D. Ill. 1948). See also *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 at 392.

There is no question that in the present case Bolger's confession was procured through violations of Rule 5(a) F. R. Crim. P. and of the Fourth Amendment. Judge Bryan said. "It needs no further discussion to demonstrate that the incriminating statement was the result of a clear violation of Rule 5(a) of the Federal Rules of Criminal Procedure and of the illegal search and seizure and I so find." 189 F. Supp. at 254 (emphasis added).

As the procurement of Bolger's confession was in violation of the Fourth Amendment, the decision in *Mapp v. Ohio* requires the state court of New York to hold it inadmissible in evidence; Bolger, therefore, has his remedy in the state court, and the injunction issued by the court below is now unnecessary and should be dissolved.

There may be some concern lest the New York court find that the Fourth Amendment does not render the confession inadmissible here, because Cleary, the state officer, did not actually participate in the illegal search and seizure and only participated in getting the confession, by his presence, though other state agents had questioned Bolger. But it would take some lively sophistry on the evidence adduced here to find that the confession was not a fruit of the illegal search and seizure. That "fruits" are proscribed by the *Mapp* case is apparent from the [fol. 53] discussion on page 16 (slip sheet opinion), and by the references on p. 6 to *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920); see also *Nardone v. United States*, 308 U. S. 338 (1939); *Somer v. United States*, 138 F. 2d 790. (2d Cir. 1943).

The reasoning of the majority seems to be that, because there is a risk that the state court may not apply *Mapp* to the facts of this case, and because *Mapp* is "unclear" as to whether or not it compels the states to follow federal statutes and rules enacted to implement and preserve con-

stitutional rights, the doctrine of *Rea v. United States*, 350 U. S. 214 (1955) should be extended to cover a state official testifying in a state court prosecution, to preserve the integrity of federal rules and statutes.

The *Rea* case stands for the proposition that the district courts have a duty to enjoin federal law enforcement agents from testifying in a state court prosecution concerning evidence illegally gained. This ruling was made in a case where it was perfectly clear that the federal agent, balked by the federal rules from using the illegally gained evidence in the district court, where the evidence was suppressed, with the specific intent of using it in the state court, himself "swore to a complaint before a New Mexico judge and caused a warrant for petitioner's arrest to issue." To bring the present case within the "fall-out" area of *Rea* the majority say "the federal officials attempted to pass the fruits of their illegal activities on to the state by calling in state officials at the time of the illegal detention." This finding of intent and purpose was never made by the trial court. The most said by the trial court in its finding was, "The Waterfront Commission, which worked in close cooperation with the Customs Service, had been informed of Bolger's detention." Later in its discussion the trial court said, "He (Cleary) was present at the questioning as a representative of the [fol. 54] Waterfront Commission . . . This was the result of the commendable cooperation between the Customs Service and the Commission who were both concerned with law enforcement on the waterfront," and later, "Cleary was present at the questioning by invitation of the Customs Service." Nowhere is there anything to indicate that this invitation and cooperation was part of an evil purpose of the federal agents to "attempt to pass the fruits of their illegal activities on to the state" to promote a prosecution there, which could not be carried out in the federal court. There is nothing to show that Cleary's presence came about as the result of anything more than what the Supreme Court referred to in *Elkins v. United States*, 364 U. S. 206 at 211 as " . . . the entirely commendable practice of state and federal agents to cooperate with each other in the investigation and detection of criminal activity." Cleary was not present at the

confession merely as a casual by-stander or as a witness or as a "human recorder"; he was a law enforcement officer of the State of New York, present in the course of his official duties.

There was good reason at the time of the issuance of the injunction by the trial court, before the Supreme Court's holding in *Mapp v. Ohio*, *supra*, to include within its reach, Cleary, the state official, to prevent a violation of Bolger's constitutional rights, for Bolger then had no other recourse. To continue it now is, in effect, saying that, though the state court is now bound to protect Bolger's rights under the Fourth Amendment, *Mapp* does not make it clear that the state courts are bound to protect Bolger against a violation of Rule 5(a) F. R. Crim. P., and the federal courts must, therefore, enjoin a state agent from testifying in a state court to insure the integrity of the application of that federal rule. This, to my mind, is an unwarranted invasion of the rights and powers of the states.

[fol. 55] To attempt to base a rule on the degree or weight of the state agent's participation in a joint enforcement endeavor is wholly impractical. Either the law should be that the use in the state courts of all evidence obtained by state agents, illegally under federal rules or statutes, shall be enjoined by the district courts where, in procuring that evidence, the state agents have been assisted in whole or in part by federal agents; or the law should be that the admissibility of such evidence in the state courts shall be left wholly in the power of the state courts. The majority decision which leans toward the former principle means that in every case where there has been any degree of "commendable cooperation" between federal and state enforcement officers, and there are involved federal constitutional rights which the states must recognize, the states are also bound to recognize and apply federal statutes or rules of procedure, made to implement and preserve them, or have their state proceedings disrupted by a federal court's injunction, if they fail to do so. To require the states to follow and apply congressional enactments and the rules of the federal courts in this fashion would constitute a long step toward

the destruction of the division of powers. It is directly contrary to *Pugach v. Dollinger*, 365 U.S. 458 (1961).

Moreover, the practical consequence would be that in nearly all cases where there had been any contact at all between federal and state enforcement officers, leading to a state prosecution, a question would be raised in the district courts by means of a petition for an injunction to determine whether or not such federal statutes or rules had been complied with. Meanwhile, the district court would be compelled to stay the state court proceedings until it had had an opportunity to hear and decide the matter. It takes no major prophet to envisage the [fol. 56] "insupportable disruption" which would result. *Stefanelli v. Minard*, 342 U.S. 117, 123-125 (1951).

I must disagree with this extension of the holding in the *Rea* case. The plaintiff's rights under the Fourth Amendment must now, in the light of *Mapp v. Ohio*, *supra*, be protected by the courts of the State of New York. He has his remedy there, and the injunction issued by the federal court should now be dissolved.

[fol. 57]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

• • • •

Present:

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
Circuit Judges,

HON. ROBERT P. ANDERSON,
District Judge.

EDWARD BOLGER, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS
MICHAEL CLEARY, DEFENDANT-APPELLANT

JUDGMENT—August 4, 1961

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

[fol. 58]

[File endorsement omitted]

[fol. 59] Petition for rehearing in banc covering 11 pages filed August 18, 1961 omitted from this print. It was denied, and nothing more by order September 25, 1961.

[fols. 60-67]

• • • •

[fol. 68]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDWARD BOLGER, PLAINTIFF-APPELLEE

v.

MICHAEL CLEARY, DEFENDANT-APPELLANT

PER CURIAM DENYING PETITION FOR REHEARING—
September 25, 1961

Before CLARK and WATERMAN, Circuit Judges, and
ANDERSON, District Judge.

On Petition for Rehearing.

William P. Sirignano, Gen. Counsel, and Irving
Malchman, Ass't. to the Gen. Counsel, Waterfront
Commission of New York Harbor, New York City,
for petitioner-appellant Michael Cleary.

PER CURIAM:•

Petition for rehearing denied.

C. E. C.
S. R. W.
U.S.C.JJ.

I dissent and vote to grant.

R. P. A.
U.S.D.J.

September 25, 1961

[fol. 69] [File endorsement omitted]

[fol. 70]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

• • • •

Present:

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
Circuit Judges,

HON. ROBERT P. ANDERSON,
• District Judge.

EDWARD BOLGER, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, ET AL.
MICHAEL CLEARY, DEFENDANT-APPELLANT

ORDER DENYING PETITION FOR REHEARING—
September 26, 1961

A petition for a rehearing having been filed herein by
counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A: DANIEL FUSARO
Clerk

[fol. 71]

[File endorsement omitted]

[fol. 72].

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDWARD BOLGER, PLAINTIFF-APPELLEE

v.

MICHAEL CLEARY, DEFENDANT-APPELLANT

DENIAL OF PETITION FOR REHEARING IN BANC—
September 26, 1961

Before LUMBARD, Chief Judge, CLARK, WATERMAN,
MOORE, FRIENDLY and SMITH, Circuit Judges.

On Petition for Rehearing in Banc.

William P. Sirignano, General Counsel and Irving
Malchman, Assistant to the General Counsel,
Waterfront Commission of New York Harbor,
New York City, for petitioner-appellant Michael
Cleary.

Judges Lumbard, Moore and Friendly having voted to
grant the application, and Judges Clark, Waterman and
Smith having voted to deny, the application is denied for
lack of a majority in favor of the application.

/s/ J. EDWARD LUMBARD
Chief Judge

26 September 1961

[fol. 73] [File endorsement omitted]

[fol. 74]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

• • • • •

Present:

HON. J. EDWARD LUMBARD, Chief Judge,
HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

EDWARD BOLGER, PLAINTIFF APPELLEE

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS
MICHAEL CLEARY, DEFENDANT APPELLANT

ORDER DENYING PETITION FOR REHEARING IN BANC—
September 26, 1961

A petition for a rehearing in banc having been filed
herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and here-by is denied.

A. DANIEL FUSARO
Clerk

[fol. 75] [File endorsement omitted]

[fols. 76-79] • • • • •

[fol. 80]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDWARD BOLGER, PLAINTIFF APPELLEE

MICHAEL J. OLARY, DEFENDANT-APPELLANT

and

* UNITED STATES OF AMERICA, ROBERT G. ANDERSON, Secretary
of the Treasury of the United States of America,
Customs Agents WILLIAM J. O'SHEA and THOMAS F.
LOUGHMAN, Customs Enforcement Officers WALTER J.
CONLON and JOSEPH E. PATTERSON and DOROTHY T.
ZECHA, Shorthand Reporter, in charge of office of
Supervising Agent of Customs, Port of New York,
DEFENDANTS

DENIAL OF MOTION FOR LEAVE TO REFILE PETITION FOR
REHEARING IN BANC - October 20, 1961

William P. Sirignano, New York, N. Y., for
appellant.

All the active judges concurring, the motion is denied.

/s/ J. EDWARD LUMBARD
Chief Judge

October 20, 1961

[fol. 81]

[File endorsement omitted]

[fol. 82]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Present:

HON. J. EDWARD LUMBARD, Chief Judge,
HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

EDWARD BOLGER, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS
MICHAEL CLEARY, DEFENDANT-APPELLANT

ORDER DENYING MOTION FOR LEAVE TO REFILE PETITION
FOR REHEARING IN BANC—October 20, 1961

A motion having been made herein by counsel for the
appellant Michael Cleary for leave to refile a petition
for rehearing in banc.

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. DANIEL FUSARO
Clerk

[fol. 83]

[File endorsement omitted]

[fol. 84]

Clerk's Certificate to foregoing
transcript omitted in printing

[fol. 85]

SUPREME COURT OF THE UNITED STATES

No. 632, October Term, 1961

MICHAEL CLEARY, PETITIONER

vs.

EDWARD BOLGER

ORDER GRANTING MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS—February 19, 1962

ON CONSIDERATION of the motion of respondent for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and it is hereby, granted.

[fol. 86]

SUPREME COURT OF THE UNITED STATES

No. 632, October Term, 1961

MICHAEL CLEARY, PETITIONER

vs.

EDWARD BOLGER

ORDER ALLOWING CERTIORARI—February 19, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.